No. 78-1548

In the Supreme Court of the United States

OCTOBER TERM, 1979

CALIFORNIA BREWERS ASSOCIATION, ET AL.,
PETITIONERS

v.

ABRAM BRYANT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

RICHARD A. ALLEN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

BEATRICE ROSENBERG
Assistant General Counsel

JAMES P. SCANLAN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20506

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 585 F.2d 421. No opinion was rendered by the district court.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1978. A timely petition for rehearing was denied on January 11, 1979. The petition for

a writ of certiorari was filed on April 11, 1979, and was granted on June 4, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The United States will address the following question:

Whether a provision in the collective bargaining agreement in the California brewing industry, whereby an employee who has worked for 45 weeks in a single calendar year is classified as a permanent employee with greater benefits and job security than other employees, is part of a seniority system within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964.

STATUTORY PROVISION INVOLVED

Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), provides in pertinent part:

> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin * * *.

INTEREST OF THE UNITED STATES

Congress has placed primary responsibility for enforcement of Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission and the Attorney General. Recent decisions of this Court have held that practices which would otherwise be unlawful under Title VII are not unlawful if they are the result of bona fide seniority systems protected by Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), but the Court has not yet offered guidance as to the range of employment practices encompassed in a "seniority system" as used in that provision. In this case the court of appeals held that a collective bargaining agreement provision requiring employees to work 45 weeks in any one calendar year in order to acquire enhanced status and rights was not part of a "seniority system" within the meaning of Section 703(h), and this Court's resolution of that issue may have a significant impact on the scope of the protections of Title VII.

STATEMENT

1. The Complaint

In 1973 respondent Bryant, a black male, filed a complaint[1] in the United States District Court for the Northern District of California on behalf of himself and other similarly situated blacks against the

[1] Respondent filed an amended complaint in 1974 (A. 9-24). References in this brief to the "complaint" refer to the amended complaint.

California Brewers Association and seven brewing companies (petitioners here), and several unions. The complaint alleged that the defendants had discriminated against Bryant and other blacks with respect to their employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and in violation of 42 U.S.C. 1981.[2]

In particular, the complaint alleged that Bryant had been "employed as a temporary brewer for [petitioner Falstaff Brewing Corporation] off and on for the last five (5) years beginning May 1, 1968" (A. 17). It charged that "[i]n past years, going back as far as their inception, the defendant employers have discriminated against blacks both in hiring and employment" (*id.* at 16).[3] The complaint further alleged that "[t]he vehicles for the perpetuation of this invidious discrimination are the seniority and referral provisions of the collective bargaining agreement, which were negotiated [by all the defendants]

[2] According to the complaint, Bryant, before filing the action, had filed a timely charge with the Equal Employment Opportunity Commission and had received a right to sue letter from the Commission on July 23, 1973 (A. 19-20). Bryant also alleged that he had exhausted the grievance procedures under the collective bargaining agreement (*id.* at 20).

[3] In support of this claim, the complaint alleged, *inter alia*, "[i]n the brewery industry in the San Francisco Bay area there is only one (1) Black person employed in production and he is not a permanent employee" (A. 16), and that when Bryant was hired by Falstaff "there were no Black workers in the plant * * *. Since that time four (4) or five (5) Black employees were hired but none were granted permanent status and all have since left Falstaff" (A. 17).

a number of years ago" (*ibid.*). The complaint referred specifically to Sections 4 and 5 of the agreement (A. 16, 27-41), which define several classes of employees and their respective rights with respect to hiring and layoffs (see pages 5-9, *infra*), and alleged that those provisions "have operated to prevent plaintiff and the members of his class from achieving the rights and benefits accorded permanent employees * * *" (A. 16-17).

Although the complaint focused on the provisions of the bargaining agreement that allegedly perpetuated the effects of petitioners' discriminatory practices, it also alleged that on one occasion one of the respondent unions referred white workers with rights under the agreement inferior to Bryant's, rather than Bryant, to vacancies at a plant of petitioner Theodore Hamm Company; and that these referrals constituted racial discrimination and a violation of Bryant's rights under the agreement (A. 18).

2. The Challenged Provisions of the Collective Bargaining Agreement

The collective bargaining agreement referred to in the complaint is a multi-employer agreement negotiated more than 20 years ago by the California Brewers Association (on behalf of the petitioner brewing companies) and the Teamsters Brewery and Soft Drink Workers Joint Board (on behalf of the respondent unions) (Pet. App. 3 & n.1). Sections 4 and 5 of the Agreement (A. 27-41) establish five classes of employees and the respective rights of each

class with respect to hiring and layoffs. Three of the classes are pertinent here: "permanent," "temporary" and "new" employees.[4]

The agreement defines a permanent employee as "any employee * * * who * * * has completed forty-five weeks of employment under this Agreement in one classification in one calendar year as an employee of the brewing industry in [the State of California]" (Section 4(a)(1); A. 27). An employee who gains permanent status retains that status unless he "is not employed under this Agreement for any consecutive period of two (2) years * * *" (Section 4(a)(5); A. 29).[5]

The agreement defines a temporary employee as "any person other than a permanent employee * * * who worked under this agreement * * * in the preceding calendar year for at least sixty (60) working days * * *" (Section 4(a)(2); A. 28). The agreement defines a new employee as any employee who is not a permanent or temporary employee (Section 4(a)(4); A. 28-29).

The rights of employees with respect to hiring and layoffs depend in large part on their status as permanent, temporary or new employees. With respect to layoffs, the agreement requires each employer

[4] The agreement also establishes classes of "temporary bottlers" and "apprentices," whose status and rights are governed by special provisions not pertinent here.

[5] An employee may also lose his permanent status if he "quits the industry or * * * is discharged in accordance with the provisions of Section 3 hereof * * *" (*ibid.*).

to maintain a "seniority list". The top portion of the list consists of all permanent employees, ranked in descending order of their seniority at the establishment (*i.e.*, in order of "plant seniority"); the next portion consists of all temporary employees, also ranked in descending order of their plant seniority; and the last portion consists of all new employees, similarly ranked (Section 4(c); A. 30-31)). The agreement requires that employees lowest on the list must be laid off first (*ibid.*).

The agreement also gives permanent employees special "bumping" rights. Under Section 4(b), if a permanent employee has been laid off from any plant subject to the agreement, he may be dispatched by the union hiring hall to any other plant in the same local area, and he has the right to replace the temporary or new employee at the second plant with the lowest plant seniority (A. 30).

Finally, the agreement provides that each employer shall obtain employees through the local union hiring hall to fill needed vacancies, and it provides that the hiring hall must dispatch laid-off workers to such an employer in the following order: first, permanent employees of that employer in order of their seniority with that employer; second, other permanent employees registered in the area in order of their seniority in the industry in California; third, temporary employees in the order of their seniority in the industry in California; and fourth, new employees in the order of their seniority in the industry in California (Section 5(c); A. 37-38).

Because there has been no trial in this case, the actual effect of these provisions has not been precisely determined. The complaint generally alleged that they had the effect of perpetuating the effects of discrimination (A. 16). Moreover, it appears that demand for labor has declined in the California brewing industry since these provisions went into effect, with the result that for a number of years few, if any, temporary employees have been able to work for enough weeks in any calendar year to acquire permanent status (see Pet. App. 3).

It is apparent from the terms of Sections 4 and 5 of the agreement that the acquisition of permanent status, and the enhanced rights that go with it, do not depend on the cumulative length of an employee's service with the employers who are parties to the agreement. For example, if Employee A worked 46 weeks in 1960 (and thereby acquired permanent status) and two weeks every year thereafter, he would continue to be a permanent employee and have superior rights to Employee B who started work in the industry in 1965 and worked 44 weeks in that year and every succeeding year.[6] Employee B would also have inferior rights to Employee C who started

[6] As noted *supra*, page 6 & note 5, an employee loses his permanent status if he "is not employed under this agreement for any consecutive period of two (2) years," or if he "quits the industry or * * * is discharged in accordance with the provisions of Section 3 hereof * * *" (Section 4(a)(5); A. 29). The record does not indicate what conduct on the part of a permanent employee would be deemed to constitute "quit-[ting] the industry."

work in 1976 and was able to work 46 weeks in that year.[7] Moreover, the permanent status acquired by A and C in this example, and the bumping, layoff and rehiring rights flowing from that status, further diminish the chances of B and other temporary employees from ever working long enough in any one calendar year to acquire permanent status; these provisions thus tend to "lock" classes of employees into their status.

3. The Decisions Below

The district court granted the defendants' motions to dismiss the complaint for failure to state a claim on which relief could be granted (A. 43-45). The court issued no opinion; its judgment was apparently

[7] In this latter example, if both Employee B and Employee C attempted to work as much as possible in 1976, both would have a substantially equal chance to gain permanent status in that year, assuming proper and non-discriminatory application of the agreement. (B's substantial length of service in the industry would be a slight factor in his favor; for example, he should be dispatched to vacancies first (Section 5(c); A. 37-38), and if B and C began work in the same plant on the same day in 1976 and a layoff decision came down to a choice between the two of them, C should be laid off first. See Section 4(c)(5)(2); A. 31.) But a large number of fortuities could result in only C's acquiring permanent status in 1976 despite B's far greater length of service under the agreement. Thus B might have found work with a plant that had to lay him off after 40 weeks because of a decline in orders while C found work with a plant whose business was thriving. Or B might be "bumped" by a permanent employee who had been laid off by another plant in B's local area. Or B might have been incapacitated for two months that year, or might have gone to another state for several months to seek more stable employment.

based on the defendants' contention that the challenged portions of the collective bargaining agreement constituted a "bona fide seniority system" within the meaning of Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), and thereby were outside the prohibitions of Title VII even if they perpetuate the effects of past discrimination (see Pet. App. 5).

The court of appeals reversed (Pet. App. 1-13). It held that the provision of Section 4(a)(1) of the agreement, requiring an employee to work 45 weeks in one calendar year in the industry to acquire permanent status, was not part of a "seniority system" at all within the meaning of Section 703(h), because that provision "lacks the fundamental component of such a system * * * [which is] the concept that employment rights should increase as the length of an employee's service increases" (*id.* at 8-9). The court pointed out (*id.* at 9-10) that in contrast to a traditional seniority system,

> the acquisition of permanent status may be independent both of the total time worked and the overall length of employment. Some employees could acquire permanent status after only 45 weeks of work, if the 45 weeks were served in one calendar year. Other employees could work for many years and never attain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year.

The court concluded that (*id.* at 12) "while the collective bargaining agreement does contain a seniority

system, the 45-week provision is not a part of it." The court explained (*id.* at 12 n.11):

> The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e.g.*, an academic degree requirement) or classification device (*e.g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line.[8]

Accordingly, the court of appeals remanded the case to the district court to enable Bryant to prove his claim that the 45-week provision had a discriminatory impact on black workers under the principles of *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971) (Pet. App. 13).[9]

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[8] The court also observed (Pet. App. 11) that "the 45-week requirement makes the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status." This aspect of the system, is in contrast to true seniority systems, in which rights "usually accumulate automatically over time * * *" (*ibid.*).

[9] The court also directed the district court on remand to permit Bryant to prove his allegation that provisions of the collective bargaining agreement had been discriminatorily applied and his claims of unfair representation by the unions in violation of 29 U.S.C. 159(a) and 185(a) (Pet. App. 12-13).

INTRODUCTION AND SUMMARY OF ARGUMENT

The general principles governing the rights protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are fairly well settled by this Court's decisions. In broad terms, Title VII makes it unlawful for employers, after the effective date of the Act, to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *." 42 U.S.C. 2000e-2(a)(1). A rule or practice of an employer that is neutral on its face may be unlawful under the Act if it has a substantially disparate impact on any protected group or if it perpetuates the effects of the employer's prior discrimination. If an employee or applicant for employment demonstrates that a rule or practice has such a disparate impact or perpetuates the effects of prior discrimination, he establishes a prima facie case that such rule or practice is unlawful under the Act. An employer may rebut a prima facie case by showing that the rule or practice is justified by business necessity (*e.g.*, that a required qualification is job related and there is no satisfactory alternative having less disparate impact), but the employer may not defend on the ground that it had no intent to discriminate. See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 328-331 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 334-343 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

One limited statutory exception to the prohibition against rules or practices that have disparate impacts or that perpetuate the effects of pre-Act discrimination concerns "bona fide seniority systems." Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), provides in pertinent part that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race [*etc.*] * * *." In *International Brotherhood of Teamsters* v. *United States*, *supra* (hereinafter "*Teamsters*"), this Court held that under Section 703(h), a bona fide seniority system is not unlawful even if it perpetuates the effects of pre-Act discrimination. The Court, however, recognized, as the statute provides, that a seniority system is not "bona fide" if it was established for the purpose of discriminating against a protected group [10] and that Section 703(h) does not

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[10] In our view, a seniority system would also not be "bona fide" if it were contrary to other laws, such as the National Labor Relations Act. This case does not present the question whether the challenged provisions of the agreement, assuming them to constitute a "seniority system," are "bona fide." The complaint does not allege that these provisions were instituted for a discriminatory purpose, or that they violated the National Labor Relations Act, which would ordinarily be a claim that would have to be presented to the National Labor Relations Board in the first instance. The complaint did allege the related but distinct claim that the respondent unions violated their duty of fair representation under the

immunize the manipulation or application of a seniority system in an intentionally discriminatory manner. 431 U.S. at 353, 356.

In *Teamsters*, the Court considered a seniority system under which the acquisition of certain rights (vacations, pensions and other fringe benefits) depended on the employee's cumulative length of service with the company and the acquisition of other rights (preferences in bidding for job vacancies and protections from layoffs) depended on the employee's cumulative length of service in his bargaining unit within the company. Although the Court recognized that there are a great variety of seniority systems and that seniority may be "measured in a number of ways" (431 U.S. at 355 n.41), it did not attempt to define the statutory meaning of "seniority system" or to identify the essential elements of such a system.

This case involves provisions governing the rights of employees that are significantly different from those involved in *Teamsters*, and the question presented for this Court's review is whether the court of appeals correctly concluded that the 45-week rule in petitioner's collective bargaining agreement is not a seniority system within the meaning of Section 703(h).[11] With respect to that question, the statute,

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Act (cf. *Vaca* v. *Sipes*, 386 U.S. 171 (1976)), and the court of appeals correctly remanded that claim for consideration by the district court. See also note 11, *infra*.

[11] The complaint and the decision below also raise other questions not presented for this Court's review. Although the complaint focuses on the 45-week rule of the agreement, it also includes several allegations that state a claim whether or not the 45-week rule is part of a seniority system within the meaning of the statute. Thus, it alleges that some of the defendants discriminated against Bryant by failing to dispatch him to job vacancies in the order required by the agreement, in violation of Title VII, 42 U.S.C. 1981, and 29 U.S.C. 159(a) and 185(a) (A. 18). It also alleges that the defendant unions violated 29 U.S.C. 159(a) and 185(a) by failing fairly to represent Bryant and similarly situated employees in negotiating the agreement (A. 19). It was error for the district court to dismiss these claims on the pleadings. The court of appeals correctly directed the district court to consider those claims on remand and petitioners have not sought this Court's review of that aspect of the decision below.

its legislative history, and the cases provide limited guidance. The statute does not define "seniority system" and the legislative history does not indicate the precise scope of the term. The decisions of this Court also have not construed the meaning of the term in the context of Section 703(h) and only three other court of appeals decisions have considered whether a particular system or rule constitutes a seniority system under that section, with somewhat divergent results [12] (see pages 20-21, *infra*). The general term "seniority system" has been discussed in cases and scholarly literature in a number of other statutory contexts, such as the Military Selective Service Act and the National Labor Relations Act, but in those other contexts a precise definition of "seniority

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[12] *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1388-1389 (5th Cir.), on rehearing, 583 F.2d 132, 133 (1978); *Patterson* v. *American Tobacco Co.*, 586 F.2d 300, 303 (4th Cir. 1978), pending rehearing en banc (Nos. 78-1083, 78-1084); *Alexander* v. *Aero Lodge 735, International Assn. of Machinists*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978).

system" often has not been necessary because legal rights have not depended on it. In any event, those discussions, though helpful in some cases (see pages 28-35, *infra*), are not dispositive of the proper construction of the term in the context of Title VII and its own particular purposes.

In our view the court of appeals correctly concluded that the 45-week rule did not constitute a seniority system within the meaning of Section 703(h). As discussed more fully below, our submission rests on three principles that we believe are important in determining whether particular rules or practices constitute "seniority systems" within the meaning of Section 703(h).

First, the fact that a rule may be ancillary or related to a system of employee rights and privileges that has true seniority features does not make that rule itself qualify as a "seniority system" entitled to the immunity of Section 703(h). We believe that under the statute, courts are required to analyze the nature of the particular rule or rules that are challenged and may not conclude that they are protected simply because they may be related to a system with true seniority features.

Second, we submit that the court of appeals correctly identified the essential elements of a seniority system as a system in which rights accrue primarily on the basis of cumulative length of service in the relevant unit and in which the accrual of those rights is fairly automatic and does not depend significantly on fortuities unrelated to cumulative length of service. How employers and employee bargaining agents may incorporate these elements in particular agreements is permissibly subject to considerable variation, but the court below correctly concluded that the challenged provisions in this case lack these essential elements of a seniority system.

Third, the foregoing conclusions are supported by the general principle that exceptions from the provisions of a remedial statute should be narrowly construed. See, *e.g.*, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, No. 77-952 (Feb. 27, 1979), slip op. 25; *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). Thus, however loosely the term seniority system may be used by courts and commentators in other contexts, the broad remedial purposes of Title VII (see, *e.g.*, *United Steelworkers* v. *Weber*, No. 78-432 (June 27, 1979), slip op. 6-8) support the court of appeals' construction of the term in this context.

ARGUMENT

I. THE FACT THAT RULES OR PRACTICES MAY BE RELATED TO A SYSTEM WITH TRUE SENIORITY FEATURES IS NOT A SUFFICIENT BASIS FOR CONCLUDING THAT THOSE RULES OR PRACTICES CONSTITUTE A "SENIORITY SYSTEM" ENTITLED TO THE IMMUNITY OF SECTION 703(h)

Petitioners, the respondent unions and amici supporting them argue that there are a wide variety of what are commonly understood to be seniority systems in the United States, and that although "seniority"

itself is a measure of time worked, most "seniority *systems*" have a large number of ancillary rules or requirements for the acquisition or retention of rights which are not related to time worked. For example, there may be threshold requirements for entering the seniority ladder (*e.g.*, probationary periods, or experience in a particular job or unit), or conditions on which seniority may be lost (*e.g.*, discharge or prolonged absence). All such ancillary rules, it is argued, are integral parts of "seniority systems" and are entitled to the immunity of Section 703(h). They further argue that to hold otherwise would significantly reduce the negotiating flexibility of employers and collective bargaining agents. (See Pet. Br. 25-39; Union Br. 21-50; AFL-CIO Br. 6-20; Equal Employment Advisory Council Br., *passim.*)[13]

This argument, which is central to petitioners' position, is in our view incorrect. Suppose, for example, a provision of a collective bargaining agreement (which might be entitled and referred to by the parties as "Seniority System") provided that protections against layoffs and priorities for job bidding depended on the amount of time the employee worked in the unit *and* his score on a vocabulary test (or some weighted average of the two). Or suppose it provided that an employee had to achieve a certain

[13] The brief of amicus Equal Employment Advisory Council is perhaps most explicit on this point: it contends (page 10) that "in order to determine whether the provision is in fact part of a seniority system, the courts should look only for a nexus between the provision in question and the operation of the system as a whole."

score on the test before he could begin to accumulate the seniority that would give him those protections and priorities. In these examples, the test score requirement is clearly related to the entire system of acquiring rights and privileges, and could even be described as integral to it, but we submit that it would be incorrect to regard the test score requirement as the kind of "seniority system" that Congress intended to immunize from the prohibitions of Title VII.[14] Indeed, if a rule or requirement were entitled to immunity under Section 703(h) merely because it is related to a system of acquiring rights containing true seniority features, the high school diploma and test score requirements considered in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), would have been entitled to immunity because they were conditions for being hired or transferred, and thus for inclusion in the company's various seniority ladders.

In sum, it is not sufficient for a challenged rule or practice simply to be related to or part of a system

[14] It would be incorrect to regard such a requirement as entitled to immunity unless "seniority system" were so broadly defined as to include any rules governing the acquisition of superior employment rights and privileges regardless of their relationship to time served. As the court of appeals correctly observed (Pet. App. 12, n.11), under petitioners' position "any hiring policy (*e.g.*, an academic degree requirement) or classification device (*e.g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line." Such a broad definition is plainly at odds with the common understanding of the "seniority system" and with Congress' intent in Section 703(h).

with seniority features to come within the exception of Section 703(h). In our view the court of appeals correctly concluded that the statute required it to analyze the system of rules more carefully and to determine whether the particular rule that is challenged itself contains the essential elements of the seniority principle.

The Fourth and Fifth Circuits have reached the same conclusion in decisions dealing with the scope of the term "seniority system" under Section 703(h). *Patterson* v. *American Tobacco Co.*, 586 F.2d 300 (4th Cir. 1978) (pending rehearing en banc (Nos. 78-1083, 78-1084)); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 583 F.2d 132 (5th Cir. 1978). Although the rules challenged in those cases are somewhat different from the 45-week rule in this case, the courts correctly held that they were not immunized by Section 703(h) merely because of their relationship to a system containing seniority features. Thus, *Patterson* involved, *inter alia*, an informal requirement that employees in one department (with one seniority ladder) could not transfer to a higher level department (with a separate seniority ladder) unless they were familiar with the duties of the new job in the opinion of their supervisor. In holding that this requirement was not a seniority system, the court stated (586 F.2d at 303): "Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it insulates only the seniority aspects of the promotional system." *Parson* also dealt with a requirement for inter-department transfer—that the transferee work at a

lower paying job for at least 10 days. The court held (583 F.2d at 133; emphasis in original): "While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters*, the ten-day bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is *not* immunized by § 703(h) and *Teamsters*." [15]

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[15] Petitioners and the respondent unions rely (Pet. Br. 33-34; Union Br. 38-39) on the Sixth Circuit's decision in *Alexander* v. *Aero Lodge 735, International Assn. of Machinists*, 565 F.2d 1364 (1977). Although that decision seems to suggest a somewhat different view, its holding is not contrary to our position. That case involved a rule under which bidding preferences for particular jobs were based on the relative plant-wide seniority of those employees who had had experience with that job. In holding that the rule was immune under Section 703(h), the court rejected the argument that these "job equity" features were "not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. The Act, however, speaks not simply of seniority but of ['] a bona fide seniority . . . system.'" 565 F.2d at 1378. While this statement would suggest support for petitioners' position, the court's holding was that the rule was simply a way of designating the group or unit of employees within which seniority accrues—*e.g.* a type of "limited occupational seniority" (565 F.2d at 1378) not different in substance from the departmental seniority considered in *Teamsters*. See note 19, *infra*. Whether or not the Sixth Circuit was correct on those facts, the rules challenged in the present case and in *Patterson* and *Parson*, in contrast, are not simply rules designating groups within which seniority accrues on occupational or departmental lines, but are rules giving different seniority rights to employees within the same department, unit or occupation on the basis of requirements which, as we discuss in point II, *infra*, do not embody the seniority principle.

Petitioners and those supporting them are incorrect in arguing that the court of appeals' approach would deprive employers and unions of appropriate flexibility in negotiating collective bargaining agreements tailored to their particular needs and circumtances. Any conclusion that a rule is not a seniority system entitled to the immunity of Section 703(h) does not mean that such a rule is unlawful under Title VII. The complainant must still demonstrate that the rule has had a disparate impact on a protected group or has perpetuated the effects of pre-Act discrimination. And even if the complainant demonstrates those effects, it is open to the defendant to show that the rule is justified by business necessity.[16] Indeed, employers and unions typically negotiate many rules and practices that have nothing to do with seniority. In short, the only effect the court of appeals' approach might have on employers and unions would be to deter them from negotiating and maintaining provisions that have no significant business justification and that they have reason to believe would have a disparate impact on protected groups or would perpetuate the effects of pre-Act discrimination. That kind of collective bargaining "flexibility," we submit, is not what Section 703(h) was designed to protect.

[16] In this case, respondent Bryant has not yet had an opportunity to prove his allegation that the 45-week rule has had prohibited effects and at a trial it would be open to petitioners and respondent unions to demonstrate a business necessity for the rule. As yet, however, petitioners and respondent unions have not alleged even a business interest served by the rule.

II. THE CHALLENGED 45-WEEK RULE IS NOT A SENIORITY SYSTEM UNDER SECTION 703(h) BECAUSE THE ACCRUAL OF RIGHTS DOES NOT DEPEND PRIMARILY ON CUMULATIVE LENGTH OF SERVICE

1. In our view, as we have stated in point I, *supra*, the dispositive question in this case is not whether the challenged 45-week rule is related to or part of a system with true seniority features, but whether the challenged rule itself contains the essential elements of the seniority principle. With respect to this question there appears to be no disagreement among the parties and the court of appeals on certain matters. First, no one disputes that certain provisions of the collective bargaining agreement in this case contain the essential elements of the seniority principle. These include the rules providing that the rights of employees within each class (*i.e.*, with respect to other employees in the class) depend on relative lengths of service within various specified units. Thus, a temporary employee who has worked 30 weeks in a plant must be laid off before another employee in the plant who has worked 31 weeks. The disagreement among the parties centers on whether the requirement for passing from the temporary to the permanent class contains the essential elements of seniority.

Second, no one disputes that the basic concept of seniority is, at a minimum, some measure of time worked in a specified unit—*i.e.*, it is not a measure of educational achievement, job performance, family relationships with existing employees, or any other

criteria on which superiority of employee rights and privileges could be based but that are unrelated to time worked. Thus, petitioners state—(Br. 26): "*Seniority* is any measure of time worked, usually with an industry, employer, plant, bargaining unit, department or job." The dispute in this case concerns the *appropriate* measure of time worked.

In one sense, of course, the 45-week rule is a measure of time worked: a temporary employee must work 45 weeks in any one calendar year in order to become a permanent employee; and petitioners appear to argue that the rule therefore embodies the principle of seniority (Br. 20-22).[17] We disagree, however, with the proposition that a rule governing the acquisition of rights is a "seniority" rule merely because it is based on some measure of time served. Suppose, for example, that a rule provided that in order to become a permanent employee one must work seven days in any one week—a rule that might well

[17] Petitioners' position on this point is not entirely clear. While they argue (Br. 20) that a temporary employee's "chances for becoming a Permanent employee are enhanced over time * * *," they also state (*id.* at 21) that "the acquisition of Permanent status is not independent of total time worked, except in the most technical sense." Respondent unions also seem to contend that the 45-week rule, in contrast to other classification devices, embodies the seniority principle; thus they state (without further discussion) that "[t]he forty-five week rule is based on industry service as defined in the rule itself" (Br. 40). Both petitioners and union respondents, however, rely primarily on the argument that the rule is entitled to Section 703(h) immunity because it is an integral part of the entire seniority system (see discussion, *supra*, pages 17-22).

prevent an orthodox sabbatarian from ever acquiring permanent status despite many years of faithful and virtually continuous service to his employer. Although such a rule is based, in a sense, on a measure of time served, we think that few would regard it as a "seniority" rule or system. While the rule in this example may be improbable, it is analytically no different from the rule in this case. By requiring that the time served be within a given period of time, the vice in both instances is that no credit is given for the employee's previous or cumulative service. The seniority system considered by this Court in *Teamsters* and other cases,[18] in contrast, had no such feature, but instead provided for the accrual of rights on the basis of cumulative service in the specified units.

In our view, a seniority system, as it is used in Section 703(h) and as it is commonly understood, is one in which the accrual of rights depends primarily on the cumulative length of service in the specified unit.[19] If we are correct, it cannot be seriously dis-

[18] *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

[19] Whether the rules specifying the units within which seniority is accrued are themselves immune from scrutiny under Title VII is a question this Court need not decide in this case. Because there can be no meaningful seniority system in the absence of some specification of the unit within which rights are accrued, it could be argued that such speci-

puted that the 45-week rule in this case is not a seniority system. A temporary employee's total length of service in prior years is of no significant benefit to his acquisition of permanent status. He may have worked 44 weeks in the industry for each of the past 20 years; yet at the beginning of each year his chances of becoming a permanent employee are not significantly greater than a new employee's. Moreover, his employment rights may always be inferior to those of some permanent employee with far

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fication is an indispensable part of every seniority system, and equally entitled to immunity under Section 703(h). Cf. *Teamsters, supra.* On the other hand, if the specification of the units within which seniority accrues is itself based on a criterion that has a disparate impact, it seems to us questionable whether that specification would be similarly entitled to immunity. Suppose, for example, that an agreement provides that the seniority of all company employees is based on length of service with their particular plant, except that the seniority of sons of employees is based on their company-wide seniority. Cf. *Teamsters, supra,* 431 U.S. at 349 & n.32. Although the Court in *Teamsters* held that Section 703(h) applied to a system in which seniority was based on length of service within particular bargaining units, the Court stated (431 U.S. at 356): "The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relations Board precedents." Whether other ways of specifying the units within which seniority accrues would be similarly protected seems to us an open question. In this case, however, we do not understand respondent Bryant as having challenged the provision of the agreement specifying the units within which seniority accrues for different purposes.

less total service in the industry. See pages 8-9, *supra.*[20]

As we have noted (pages 14-15, *supra*), whether or not we are correct that a seniority system requires recognition of an employee's cumulative length of service is a question on which Title VII, its legislative history and the cases provide limited guidance. Title VII does not define "seniority system." Moreover, although the legislative history cited by the union respondents and this Court in *Teamsters*[21] indicates (as the Court held) that Congress desired to protect "seniority" rights of existing employees, none of it clearly indicates what Congress meant by "seniority" rights or "seniority system."

Nevertheless, to the extent the legislative history sheds light on the issue in this case, it supports our position. Thus it is significant that the only example

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[20] We do not contend that a seniority system must in every case provide for an incremental increase in rights with each additional day worked (which might be the case with a simple last-hired-first-fired rule). A seniority system may provide for the acquisition of rights in stages, defined by minimum periods of service in the specified unit (*e.g.*, an increase in vacation or other benefits after a certain number of years of service in the unit), so long as the acquisition of those rights is based primarily on cumulative length of service in the unit. In this case, for example, if the agreement provided that an employee becomes a permanent employee after 45 weeks of cumulative service in the industry (whether or not within one calendar year), it would in our view qualify as a seniority system under Section 703(h).

[21] Union Br. 26-32; *Teamsters, supra,* 431 U.S. at 350-352. See also *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 758-763 (1976).

of a seniority system discussed in that history is one in which rights ordinarily accrue on the basis of cumulative length of service—*i.e.*, the normal rule that the last employee hired is the first fired. See 110 Cong. Rec. 7207, 7213, 7217 (1964). In addition, a statement of the Department of Justice, considered and relied on during the debates on Title VII (110 Cong. Rec. 7207 (1964)),[22] also seems to reflect the view that seniority rights are those that are based on cumulative length of service, not merely on completion of a certain period of service within a specified span of time. Thus, the Department stated (*ibid.*; emphasis supplied): "If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of [Title VII]. * * * But, in the ordinary case, assuming that seniority rights were *built up over a period of time* during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII."

Furthermore, although this Court has not considered the precise scope of the term "seniority system" in cases dealing with Section 703(h) of Title VII, our position finds considerable support in this Court's decisions dealing with a similar question under Section 9 of the Military Selective Service Act, now codified at 38 U.S.C. 2021, and its predecessors.

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[22] Cited in full in *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 760 n.16.

That statute provides that any person who has left a permanent position with any employer to enter the military and who reapplies for employment within 90 days of his discharge must "be restored to such position or to a position of like seniority, status, and pay * * *." In determining whether a particular right or benefit is a right or benefit of "seniority" to which returning veterans are entitled under Section 9, this Court has developed a twofold test. Under that test, a right or benefit is a perquisite of "seniority," first, if it would have accrued with reasonable certainty had the veteran remained in the job instead of serving in the military, and second, if it is in the nature of "reward for longevity with an employer." *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 589 (1977). Both of these considerations, as they have been explained and applied by the Court, support our position that the 45-week rule is not a seniority system.

With respect to the reasonable certainty test, the Court has explained that a right or benefit is not a perquisite of seniority if it depends primarily on factors, such as the employer's discretion, unrelated to length of service with the employer. Thus, in *McKinney* v. *Missouri-K.-T R.R.*, 357 U.S. 265 (1958), a returning veteran claimed a right to a promotion that he contended he would have obtained if he had continued with the employer. The Court, however, concluded that the promotion was not a perquisite of seniority because it depended "not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part

of the employer." *Id.* at 272. See also *Tilton* v. *Missouri Pacific R.R.*, 376 U.S. 169 (1964). Similarly, the 45-week rule in this case and related provisions in the agreement provide no reasonable certainty that the benefit (permanent status) will accrue fairly automatically with increased length of service; instead it depends mainly on the discretion of the employer (in deciding when and how many employees to lay off each year) or other fortuities (*e.g.*, seasonal fluctuations in business or bumping by permanent employees).[23]

It is true, as the Court recognized in *Tilton* v. *Missouri Pacific R.R.*, *supra*, 376 U.S. at 180-181, that the acquisition of true seniority rights inevitably depends on some fortuities—*e.g.*, that the employee is not discharged for cause, or does not die, quit or become incapacitated. Nevertheless, *Tilton* and *McKinney* v. *Missouri-K.-T. R.R.*, *supra*, reflect the proposition that the essence of a seniority system is one that provides reasonable certainty to employees

[23] As the court of appeals correctly observed, the 45-week rule is particularly susceptible to manipulation by employers and unions in order to exclude disfavored employees (Pet. App. 11). Of course, if it can be shown that an employer or union intentionally manipulated manpower needs and the timing of layoffs in order to prevent certain protected groups from ever acquiring permanent status, a plaintiff would establish a violation of Title VII even if the 45-week rule were a seniority system within the meaning of Section 703(h). But even in the absence of such proof, we believe that the fact that a system makes the acquisition of rights so largely dependent on events within the control of the employer or some other person supports the conclusion that it is not a seniority system.

that the acquisition of certain rights will depend primarily on the length of time they are willing to provide satisfactory service (barring incapacitating events beyond anyone's control) rather than on events within the control of the employer or other persons. The 45-week rule in this case provides no such certainty.

The second indicator of seniority rights identified by this Court—whether they are rewards for longevity of service—is perhaps even more pertinent here. For example, in *Alabama Power Co.* v. *Davis*, *supra*, the Court concluded that pension benefits, which accrued on the basis of length of service, were perquisites of seniority because they were in the nature of "rewards [for] longevity with an employer" rather than compensation for service actually rendered. 431 U.S. at 593. The Court found support for its conclusion in the fact that pensions serve purposes that are distinct from the purpose of ordinary compensation for services actually rendered. The Court stated (431 U.S. at 594):

> A pension plan assures employees that by devoting a large portion of their working years to a single employer, they will achieve some financial security in their years of retirement. By rewarding lengthy service, a plan may reduce employee turnover and training costs and help an employer secure the benefits of a stable work force.

Although the focus and purpose of the inquiry under the Military Selective Service Act are some-

what different from the inquiry under Section 703(h), the same considerations are pertinent in both contexts.[24] Seniority rights are in their nature rewards for "longevity with an employer" and they serve certain characteristic interests, such as providing enhanced job or financial security for older employees, and promoting stability in the work force. Those considerations support our contention that the 45-week rule is not a seniority system. It does not reward an employee for his longevity with his employer or (as this agreement specifies) with the multi-employer bargaining unit. It only rewards an

[24] Under the second prong of the test under Section 9, the focus of the inquiry is on the nature of the right or benefit provided, and not upon the formula by which the right is computed (see *Alabama Power Co.* v. *Davis, supra,* 431 U.S. at 592), while the inquiry under Section 703(h) is whether the method by which the rights are acquired is a seniority system. But the same considerations are relevant to both inquiries. If the method by which rights are acquired does not reward longevity with the employer or promote the kinds of interests that are characteristic of seniority rights, the system should not be regarded as a seniority system even though the particular rights involved are those that are usually provided as a reward for longevity with an employer.

In view of the differences between the inquiries in each context, however, it is conceivable that a particular right might be deemed a perquisite of seniority under Section 9 even though the method by which that right is acquired might not be deemed a seniority system under Section 703(h). This possibility may result not only from the somewhat different nature of the inquiries but also from the fact that the term seniority should be liberally construed under Section 9 (see *Alabama Power Co.* v. *Davis, supra,* 431 U.S. at 584-585) but should be narrowly construed under Section 703(h) (see page 38, *infra*).

employee for completing a certain period of service within a specified span of time and for avoiding a number of fortuities that might have prevented him from doing so. For this reason an employee entering the industry cannot reasonably expect that his job security will increase so long as he is willing to provide satisfactory service. Furthermore, the rule would seem to inhibit rather than promote stability in the work force, because it provides little inducement for temporary employees with substantial cumulative experience with the multi-employer unit to return to the work force each year. Indeed, it seems to us significant that petitioners and respondent unions have not even suggested any legitimate business interest served by this rule.

2. Petitioners, the respondent unions and amici supporting them rely[25] on two early cases under the Military Selective Service Act for the proposition that seniority provisions in many collective bargaining agreements frequently do not make the acquisition of rights turn solely on the employee's cumulative length of service. *Aeronautical Industrial District Lodge 727* v. *Campbell,* 337 U.S. 521 (1949); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953). If anything, however, those cases support our contention that the concept of seniority as used and understood by Congress relates to cumulative length of service. In *Aeronautical Industrial District Lodge,*

[25] Pet. Br. 28-32, 37-38; Union Br. 21, 24-27; AFL-CIO Br. 6-7, 10-15.

a returning veteran objected to the implementation of a provision in a bargaining agreement, adopted during his military absence, that gave greater layoff protection to employees who were union chairmen than to other employees (including the veteran) with greater cumulative length of service. The Court held that the implementation of this provision was *not* in conflict with the veteran's rights under the statute; in other words, that the veteran's statutory rights to the perquisites of "seniority" did not entitle him to rights granted by the bargaining agreement on the basis of criteria (like union office) other than cumulative length of service. This holding is quite consistent with *McKinney* v. *Missouri-K.-T. R.R.*, *supra*, and other cases discussed at pages 29-31, *supra*.

The language in the opinion relied on by petitioners (see 337 U.S. at 526-527; Pet. Br. 28-29) is simply to the effect that collective bargaining agreements may, consistently with the statute, grant rights and preferred status (loosely referred to as "seniority rights") on the basis of many criteria other than cumulative length of service. What the Court held, however, was that such rights are not "seniority" rights within the meaning and intent of the statute. Certainly that case does not suggest, as petitioners seem to contend, that a seniority right as used in the Military Selective Service Act or Title VII includes all rights provided by a collective bargaining agreement to different employees, or that a seniority system as used in the statute includes any provision that the agreement calls a "seniority system."

Ford Motor Co. v. *Huffman*, *supra*, is to the same effect. There, a provision of an agreement (also negotiated in the returning veteran's absence) gave employees credit, for layoff purposes, for the period of their pre-employment military service. A returning veteran, who had no such pre-employment military service, objected that the provision gave superior status to employees with less length of service with the employer than his own, allegedly in conflict with his rights under the Act. The Court again rejected the claim. As in *Aeronautical Industrial District Lodge*, the challenged provision granted rights on a basis other than cumulative length of service with the employer, and those rights were therefore not "seniority" rights to which the returning veteran was entitled.

3. We have argued that a seniority system within the meaning of Section 703(h) is one in which the acquisition of rights depends primarily on an employee's cumulative length of service within the specified unit, and that the 45-week rule in this cases does not satisfy that principle. We do not contend, however, that that principle must be applied in any particular manner. Its application by employers and bargaining agents to particular agreements and circumstances is permissibly subject to considerable variation. For example, they may designate different units within which seniority is to be accrued for different purposes (see note 19, *supra*), and they may condition the acquisition of various rights on any length of service they deem appropriate, so long as the system for acquiring those rights gives primary recognition to cumulative length of service.

Furthermore, we do not contend that a seniority system within the meaning of Section 703(h) may not give reasonable recognition to continuity of satisfactory service. If particular rules provided, for example, that an employee loses accumulated seniority if he is discharged for cause, or if he has not worked in the unit for five consecutive years, such rules would, in our view, be consistent with the basic principle of a seniority system. See, *e.g.*, *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 555 & n.6 (1977). Under such rules, the accumulation and retention of seniority in most cases continues to be largely within the employee's control, and such rules provide existing employees with reasonable assurance that their rights will not be diminished by the unexpected return of long absent former employees. Therefore they enhance, rather than diminish, the certainty with which increased rights and benefits accrue and promote the stability of the work force. On the other hand, if particular rules provided, for example, that an employee loses all accumulated seniority if he fails for any reason to work for seven work days in any one calendar year, or if he is cited by his supervisor for some minor infraction of plant rules, such rules would not in our view constitute a rational means of rewarding continuity of satisfactory service and would not be consistent with the principle of seniority.

Distinguishing between rules that are consistent with that principle and those that are not necessarily requires some line drawing,[26] but the rule challenged in this case does not, we submit, come close to the line. The 45-week rule, in effect, prevents an employee from gaining permanent status if, for any reason, he is unemployed in the industry for more than seven weeks in any one calendar year, and it is immaterial whether that period of unemployment is a continuous period. That rule plainly does not serve any purpose of rewarding continuous satisfactory employment, and neither petitioners nor the respondent unions have contended that it does. In short, it cannot be justified as a seniority system on that ground.[27]

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[26] The same sort of line drawing is required to some extent in determining the similar question whether a right or benefit is a perquisite of "seniority" within the meaning of Section 9 of the Military Selective Service Act, discussed *supra*, pages 28-33.

[27] It may also be the case that a seniority system within the meaning of Section 703(h) can recognize other interests, in addition to cumulative length of service and continuity of service, but this case does not require this Court to identify exhaustively the interests that may properly be served. For example, it might be consistent with the principle of seniority for a system to establish separate seniority ladders for part time and full time employees, or for seasonal and year-round employees. The status of such systems under Section 703(h) need not be decided in this case because the 45-week rule is clearly not such a system. Under the rule, a temporary employee may work the same hours in the same job and in the same department as a permanent employee, and in any given year he may work substantially more weeks than a permanent employee and yet remain in an inferior status. Furthermore, 45 weeks per year cannot be justified as a reasonable definition of purely seasonal unemployment, and petitioners have not attempted to do so.

III. THE TERM "SENIORITY SYSTEM" IN SECTION 703(h) SHOULD BE NARROWLY CONSTRUED IN VIEW OF THE BROAD REMEDIAL PURPOSES OF TITLE VII

Because Title VII and its legislative history do not define or clearly indicate the scope of the term "seniority system," the question in this case is not entirely free from doubt. To the extent there is a reasonable doubt, however, courts in this context should be guided by the principle that exceptions from a remedial statute should be narrowly construed. See, *e.g.*, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, No. 77-952 (Feb. 27, 1979), slip op. 25; *Abbott Laboratories* v. *Portland Retail Druggists Assn.*, 425 U.S. 1, 12 (1976); *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968); *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). The broad remedial purposes of Title VII have frequently been recognized; as the Court said in *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 429-430, Congress' purpose "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Section 703(h) provides a limited exception for "bona fide seniority * * * system[s]" by which employers and unions are legally permitted to perpetuate the effects of their past racial discrimination. In this and other cases, that exception should be narrowly construed.[28]

[28] Petitioners have raised an additional issue that we have not addressed (Pet. Br. 3): "Whether the Court of Appeals erred by summarily deciding the seniority issue before development of a factual record concerning the operation and purposes of the brewery industry system." They argue (Br. 42-46) that the district court correctly ruled that the challenged provisions of their agreement constitute a seniority system as a matter of law, but that any conclusion that it does not could only be based on facts that have not yet been established. We disagree that any remand is necessary on this issue. The provisions of the agreement speak for themselves; there appears to be no dispute as to their meaning; and whether they constitute a seniority system under Section 703(h) is solely a question of law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

RICHARD A. ALLEN
Assistant to the Solicitor General

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

BEATRICE ROSENBERG
Assistant General Counsel

JAMES P. SCANLAN
Attorney
Equal Employment Opportunity Commission

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